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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ~~1325~~ 70-77

NORTH CAROLINA,
Petitioner,

v.

WAYNE CLAUDE RICE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR STATE OF MAINE AMICUS CURIAE

May 18, 1971.

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INTEREST OF AMICUS CURIAE

The Circuit Court's opinion disagrees with an earlier decision of the Court of Appeals for the First Circuit in Lemieux v. Robbins (1969), 414 F.2d 353, cert. den. 397 U.S. 1017, 90 S.Ct. 1247,

25 L.Ed.2d 430 (1970); a case with like facts. Maine's procedures affording a defendant a jury trial de novo following disposition in a court of limited jurisdiction, sustained in Lemieux v. Robbins, will be adversely affected by affirmance of the Fourth Circuit's decision here.

ARGUMENT

I.

THE CIRCUIT COURT HAS ERRED IN EQUATING AN "APPEAL" FROM A COURT OF LIMITED JURISDICTION TO THE SUPERIOR COURT WITH A DEFENDANT'S "RIGHT OF APPEAL" FROM A SUPERIOR COURT TO AN APPELLATE COURT.

The main authority relied on by the Fourth Circuit is North Carolina v. Pearce (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656, but that case is distinguishable on its facts. In Pearce, a jury trial conviction was followed by appellate review and subsequent retrial followed by imposition of a more drastic sentence than had first occurred. The

case involved exercise of a defendant's single "right of appeal".

The present case is not strictly an "appeal" within the tenor of Pearce. Rather, it is more an application for jury trial de novo in the Superior Court, not available earlier in the court of limited jurisdiction. Unlike the situation in Pearce, the application need not demonstrate error. Indeed, proceedings in the court of limited jurisdiction can be exceedingly minute if a defendant does not wish to go to hearing. In such instances, he may plead not guilty and waive a hearing. Under Maine procedure, the court of limited jurisdiction will then impose sentence and defendant may apply forthwith to the Superior Court for jury trial de novo. District Court Criminal Rule 40. On such application, the entire case is

moved to Superior Court where both defendant and the State start at parity. District Court Criminal Rule 39. Defendants have the benefit of two full opportunities for acquittal under the procedure in Maine, North Carolina and other jurisdictions having like procedures. Evans v. City of Richmond (1969), 210 Va. 403, 171 S.E.2d 247; People v. Olary (1969), 382 Mich. 559, 170 N.W.2d 842; and State v. Stanosheck (1970), 186 Neb. 17, 180 N.W.2d 226.

II.

THE TWO-STEP "APPEAL PROCEDURE" PRESENT IN BOTH THIS CASE AND IN LEMIEUX SERVES A LEGITIMATE PURPOSE AND IS FAIR AND REASONABLE.

The defendant in the present case lost nothing by first going to hearing in the court of limited jurisdiction followed by application to the Superior Court for de novo jury trial. The decision of the

Fourth Circuit does not rest upon any showing of prejudice to Rice.

The reference procedure serves a legitimate interest of the State in seeking a reduction of the Superior Court case load. Too, the procedure in North Carolina (and in Maine) permits the defendant to appeal any adverse jury verdict in the Superior Court to the state appellate court.

Adoption of the decision of the Fourth Circuit, and rejection of the decision on like facts in Lemieux in the First Circuit, would result in courts of limited jurisdiction tending to give maximum sentences out of caution, perhaps in the interest of the state, which would likely have the effect of encouraging "appeals" to the Superior Court or, conversely, if the courts of limited jurisdiction tended to impose

smaller sentences, the state would likely avoid the courts of limited jurisdiction in favor of initiating cases in the Superior Court in the first instance. This reasoning expressed in Lemieux, seems logical and persuasive.

The Fourth Circuit's decision makes serious inroads upon established court procedures in several states, sans comment except that the Court does not agree with the reasons given for sustaining those procedures. The decision being reviewed compels Superior Courts to exercise sentencing jurisdiction only to the extent of the sentence of an inferior court. As noted by the First Circuit in Lemieux, the Supreme Court has never held that a state must establish channels of appellate review, but only that once established, the state must not place unreasonable restrictions on access. Pearce. Looking at the

total circumstances, the procedures involved here are reasonable and support legitimate state objectives.

In Maine, an "appeal" from the State District Court to Superior Court does not have the result of a writ of error, and there is no remand to the lower court from Superior Court. Willet v. Clark, 103 Me. 22, 67 A. 566. Where there is no review of alleged error below, but rather a new trial, the distinction is important. Lemieux v. State, et al (Maine, 1968), 240 A.2d 206. Maine seeks affirmance of the reasoning given on the question by the First Circuit in Lemieux v. Robbins, and includes that decision in the Appendix, page 3.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Augusta, Maine

APPENDIX

1. District Court Criminal Rule 37(a):

"An aggrieved defendant may appeal from a judgment of the District Court to the Superior Court in the county in which the Division of the District Court entering judgment is located. * * * "

2. District Court Criminal Rule 39 (a), (b), (c):

"Prior to the holding of the Superior Court to which the appeal is taken, the Clerk shall transmit to said appellate court the whole process and all writings and exhibits in the District Court pertaining to the case in which said appeal has been taken.

"The appellant shall be entitled to a trial de novo in the Superior Court and the proceedings therein shall be in accord with the Maine Rules of Criminal Procedure.

"An appellant may, at any time before the appeal has been docketed in the appellate court, come personally, or by leave of court, by his attorney, before the judge, who may permit him, on motion, to withdraw his appeal and abide by the sentence appealed from; whereupon,

the appeal shall be withdrawn. If the appellant is detained in jail for failure to give bail to prosecute his appeal, he may give notice in writing to the Clerk of the court of his desire to withdraw his appeal and abide by the sentence appealed from; whereupon his appeal shall be withdrawn."

3. District Court Criminal Rule 40:

"In all prosecutions in the District Court, the defendant may plead not guilty and waive a hearing, whereupon he shall be sentenced as provided in Rule 32 of these rules and may appeal as provided in Rule 37, as if there had been a full hearing.

"In those cases in which the clerk may accept a guilty plea upon payment of a fine under Rule 10 the defendant may plead not guilty and waive a hearing before the clerk, whereupon the clerk shall impose sentence, accept his notice of appeal, and fix and take bail as if there had been a full hearing.

"Failure of a defendant, prior to taking an appeal pursuant to this rule, to present any defense or objection which must be raised under Rule 12 will constitute a waiver thereof."

CERTIFICATE OF SERVICE

Pursuant to the Rules of the Supreme Court of the United States, the undersigned, counsel for State of Maine Amicus Curiae, on the date written below, did deposit a copy of the above Brief for State of Maine Amicus Curiae in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to respondent's attorney as follows: William W.Van Alstyne, Esquire, Duke University, School of Law, Durham, North Carolina 27706.

Dated: May 18, 1971.

John W. Benoit, Jr.

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United States Court of Appeals
For the First Circuit

No. 7296

FRANCIS T. LEMIEUX,
PETITIONER, APPELLEE,

v.

ALLAN L. ROBBINS, Warden,
Maine State Prison,
RESPONDENT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

John W. Benoit, Jr., Assistant Attorney General for appellant.
Jeremiah D. Newbury, with whom *S. Mason Pratt, Jr.*, and *Pierce, Atwood, Scribner, Allen & McKusick* were on brief, for appellee.

August 22, 1969.

ALDRICH, *Chief Judge*. On April 29, 1966 petitioner Lemieux assaulted one Judy Files. A complaint was lodged against him in the local district court charging an offense under 17 Maine R.S.A. § 201.[1] Petitioner pleaded not guilty.

[1] "Whoever unlawfully attempts to strike, hit, touch or do any violence to another however small, in wanton, willful, angry or insulting manner, having an intention and existing ability to do some violence to such person, is guilty of an assault. If such attempt is carried into effect, he is guilty of an assault and battery. Any person convicted of either offense, when it is not of a high and aggravated nature, shall be punished by a fine of not more than $100 or by imprisonment for not more than 6 months, or by both. When the offense is of a high and aggravated nature, the person convicted of either offense shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 5 years, when no other punishment is prescribed."

Following trial to the court he was found guilty and fined. Pursuant to Maine District Court Criminal Rules 37(a), 39(a), and (b) he "appealed" to the Superior Court for a trial de novo to a jury. The state thereupon presented petitioner to a grand jury, which indicted him for the same assault, following which action the state dismissed the complaint. Petitioner was tried to a jury in the Superior Court on the indictment, found guilty, and sentenced to a term of 1 1/2 years — 5 years.[2] Post-conviction relief having failed in the state court, petitioner brought habeas corpus proceedings in the District Court to obtain his discharge. The court ordered the relief, 294 F.Supp. 1171, and the state appeals.

We will deal first with the issue of double jeopardy, extensively argued by the petitioner but not reached by the court below. This claim has two aspects. The simple one, that placing petitioner in the position of having his sentence increased constituted double jeopardy, has now been resolved against him by *North Carolina* v. *Pearce*, U.S. (6/23/69), 37 U.S.L.W. 4601. Failing here, petitioner makes a more complex argument: that he was convicted in the Superior Court of a different, and greater, offense, albeit under the same statute, in violation of *Green* v. *United States*, 1957, 355 U.S. 184.

Until recently the Maine court held that simple assault and aggravated assault were the same offense, and that the difference was only in the sentence. *State* v. *McKrackern*, 1945, 141 Me. 194, 207-08, 41 A.2d 817, 822. *Accord*, *State* v. *Bey*, 1965, 161 Me. 23, 206 A.2d 413; *Bell* v. *State*, 1939, 136 Me. 322, 9 A.2d 129. Subsequent to petitioner's conviction the Supreme Judicial Court held in *State* v. *Ferris*, 1969, Me., 249 A.2d 523 that a defendant is entitled to a jury determination of the element of aggravation. From this rul-

[2] If petitioner had been tried on the complaint in the Superior Court his maximum sentence would have been six months.

ing it may be argued that aggravated assault is a separate offense. However, even if we were to disregard the court's pronouncement of non-retrospectivity of this ruling, petitioner is not helped by a concept of two offenses.

In *Green* the defendant, tried for first degree murder and convicted of murder in the second degree, obtained a new trial, only to be convicted of a first degree killing. The Court set this conviction aside, holding that the defendant had been duly acquitted of this offense at the first trial. This principle is inapplicable to the petitioner. The state district court had jurisdiction only over misdemeanors, 4 Maine R.S.A. §§ 152, 165, and therefore could not convict petitioner of aggravated assault, whether there be one offense, or two. Since it could not convict him, he was not in jeopardy. *State* v. *Barnette,* 1962, 158 Me. 117, 179 A.2d 800; *Commonwealth* v. *Mahoney,* 1954, 331 Mass. 510, 120 N.E.2d 645. *See* Kirchheimer, The Act, the Offense, and Double Jeopardy, 58 Yale L.J. 513, 530 & n.78 (1949). *Cf. Diaz* v. *United States,* 1912, 223 U.S. 442. Petitioner attaches significance to the fact that the district court did not exercise its option to bind him over to the Superior Court. This amounts to no more than a failure to find probable cause for prosecution for the aggravated offense. This is not jeopardy. *United States ex rel Rutz* v. *Levy,* 1925, 268 U.S. 390; *Wampler* v. *Warden of the Maryland Penitentiary,* D.Md., 1963, 218 F.Supp. 876.

We turn to the more difficult question whether permitting the state to impose a larger sentence following defendant's "appeal" was, as found by the court below, an unconstitutional limitation on the right of appeal. The court relied upon *Marano* v. *United States,* 1 Cir., 1967, 374 F.2d 583. We believe this reliance misplaced. In *Marano* the defendant, whose conviction was reversed on appeal, was retried and again convicted. Stating that the evidence on the second trial showed the defendant to have been

more deeply connected with the offense than he had previously appeared to be, the district court imposed a larger sentence. We reversed, holding that it was constitutionally impermissible to expose the defendant to a higher sentence for such a reason as the price of taking an appeal. We did not say, however, as the court did subsequently in *Patton* v. *North Carolina,* 4 Cir., 1967, 381 F.2d 636, 641, that under no circumstances could a larger sentence be imposed. We recognized possible grounds for an increase, saying by way of dictum that the sentencing court might take into consideration subsequent conduct of the defendant. 374 F.2d at 585. By this we meant that our statement in *Worcester* v. *Commissioner,* 1 Cir., 1966, 370 F.2d 713, 718, that an appeal must be "unfettered," did not mean that no "chilling effect" could ever be attached to an appeal; the question must be one of reasonableness. We find this view precisely confirmed by the Supreme Court in *North Carolina* v. *Pearce, supra.*

With this background we examine the present procedure, finding it very different from what was involved in *Marano.* Petitioner's so-called appeal was not an appeal predicated upon, or dependent upon, error, but was a claim, as of right, of a trial de novo. M. D. Ct. Crim. R. 37(a), 39(b). From the Superior Court the defendant could have the customary appeal to the Supreme Judicial Court. The purpose of the district court "appeal" was to afford petitioner his right to a jury trial under the state constitution.[3] To say that to cause him to lose the "benefit" of the district court sentence incumbers or "chills" this

[3] In Maine, it has been said, there is apparently no limitation on the right of one accused of even petty offenses to obtain a trial by jury on appeal from a court of limited jurisdiction. 3 Glassman, Maine Practice, Rules of Criminal Procedure, §23.2. In any event, in the absence of waiver manifestly petitioner could not have received his present sentence without a jury trial. *Duncan* v. *Louisiana,* 1968, 391 U.S. 145.

appeal is to assume the point. Rather, the question is, was the state constitutionally obliged to grant him this benefit, or was the procedure as a whole a reasonable one.

In answering this question we must have in mind that a defendant gives up nothing by going to trial in the district court. Nor, unlike the situation in *Pearce*, need he demonstrate error, constitutional or other, in a first trial to secure a second trial, which very proof of error gives the state the opportunity to increase the punishment. Such is indeed a one way street. Here we deal with a two way street. Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to "appeal" not only gives him a new trial but vacates the judgment and removes the entire case to the Superior Court. The state is willing to accept this in the long-run interest of reducing the load on the Superior Court. The defendant need not accept it at all.[4] If he does accept it, both he and the state start at parity; should he elect to take advantage of a second and fresh opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity.

We realize that if a defendant chooses a district court trial he may thereafter be reluctant to seek correction of any errors committed therein if to do so he must risk a sentence he considers favorable. In this sense the state has "chilled" his exercise of appeal. However, the "right" to appeal is by no means an absolute one. Indeed, the Supreme Court has never held that a state must establish channels of appellate review, only that once estab-

[4] A defendant need not even go to trial in the district court if he does not wish to. Under District Court Criminal Rule 40 the defendant may plead not guilty and waive a hearing. The court will then impose sentence and the defendant may appeal forthwith to the Superior Court.

lished, the state must refrain from placing unreasonable restrictions on access. *See North Carolina* v. *Pearce, supra,* at 4605; *cf. United States* v. *Coke,* 2 Cir., 1968, 404 F.2d 836, 843. But even assuming that there is a constitutional right to some sort of post-conviction review, *see* Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606, 613 & n.25 (1965), procedures which merely "chill" this right must be tolerated if they support legitimate state objectives and are fair and reasonable.

Looking at the total circumstances, where the state offers the defendant a full trial, with full right of appeal therefrom, in the Superior Court, we do not think it unreasonable for it to restrict the appeal from the district court in the sense here complained of. Were we to hold that the district court sentence was subject to *Marano* conditions one of two results would be likely to occur. Either the district courts would tend to give maximum sentences out of caution, in the interest of the state, which, in turn, would have the effect of encouraging "appeals," or, if the district courts tended to give small sentences, the state would be led to avoid the vesting consequences by initiating cases in the Superior Court in the first instance. The state's two step procedure has a legitimate purpose. We see no occasion for us to expose it to any such dilemma. Rather, we hold the defendant has no constitutional right to complain of a "chilling effect" when, in effect, he need not stand in the draft in the first instance.

The judgment of the District Court is vacated. The petition is dismissed.